(b)

No. 83-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The opposing briefs support, rather than rebut, the reasons advanced by TWA in support of its petition. Nothing said in the opposition briefs derogates from the significance of the legal issues raised in the petition and the need for resolution of these issues by this Court.

I. THERE SIMPLY CAN BE NO DISPUTE THAT THE CIRCUIT COURTS ARE OPENLY SPLIT AS TO WHAT IS THE APPROPRIATE STANDARD FOR "WILLFULNESS" UNDER THE ADEA

The *Thurston* plaintiffs virtually acknowledge there is a conflict among the Circuits when they state that the Circuits "do not differ *materially* in their interpretation of 'willfulness.'" (Br., p. 7).* Certainly, the Circuits *themselves* have recognized both the conflict and its significance. For example, the Seventh Circuit in *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154 (7th Cir. 1981), specifically said that the "courts of appeals have reached divergent interpretations of the term." Moreover, what was viewed as necessary for "willfulness" by the Seventh Circuit in *Syvock* was "recently rejected" by the Fourth Circuit in *Crosland* v. *Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982).

Such disarray is similarly recognized by other Circuits. In *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 980 n. 7 (9th Cir. 1981), the Ninth Circuit specifically "decline[d] to extend the punitive provision of double recovery" to the standard in the Third Circuit that "reckless violations [of the ADEA] should also give rise to liquidated damages liability." The Ninth Circuit in *Kelly* also noted how the "good faith" defense by the Fifth Circuit in *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976), "was the only circuit case that had addressed this issue and the district courts were split." (640 F.2d at 981). The Ninth Circuit then rejected *Hays* and agreed with the decision by the First Circuit in *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979), "that the good faith defense to liquidated damage recovery is not applicable in ADEA actions." (940 F.2d at 982).**

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* Emphasis is added unless otherwise noted.

** The *Thurston* plaintiffs assert that the First Circuit's decision in *Loeb* v. *Textron* "did not specifically construe 'willfulness' in the context of the ADEA." (Br., p. 8). That is certainly not the interpretation of *Loeb* by other Circuits which have discussed the case. See, *e.g.*, *Syvock, supra,* 665 F.2d at 154; *Kelly, supra,* 640 F.2d at 981-82.

All of this is not the kind of harmony among the Circuits suggested by the *Thurston* plaintiffs and the EEOC. As Judge Weinfeld of the Southern District of New York has noted, the confusion instead reflects how the Circuits "*differ* as to the interpretation of the term." *Koyen* v. *Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 n. 24 (S.D.N.Y. 1983). It is also something which the commentators are discussing with increasing frequency. See, *e.g.*, 68 Iowa L. Rev. 333, 336 (1983) ("[N]o single standard for determining willfulness under the ADEA liquidated damages provision has been agreed on by the courts. Discrepancies have arisen among the circuits regarding what constitutes a willful violation of the ADEA"); 24 B.C.L. Rev. 47, 162 (1982) ("The courts have reached divergent interpretations of the term").

It is obvious this conflict is more than just the "semantic variation" alleged by the *Thurston* plaintiffs (Br., p. 7). There exists a clear need for this Court to establish a uniform rule removing the confusion and disarray among the Circuits, and this case is an excellent vehicle to resolve the issue.*

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* The suggestion by the *Thurston* plaintiffs (Br., p. 10) that "the ultimate conclusion [would] be the same" here under any standard of "willfulness" is simply wrong. The requirement in the First and Seventh Circuits of actual intent to violate the law, *Loeb, supra,* 600 F.2d at 1020 n. 27, and *Syvock, supra,* 665 F.2d at 155, is not met here. There is no suggestion in the Second Circuit's decision that TWA specifically intended to violate the law. To the contrary, the Second Circuit inferred discriminatory intent merely from TWA's adoption of its "age 60" policy (A-24).

Moreover, even if the *Thurston* plaintiffs were not wrong, this Court certainly has reviewed questions not necessary to the outcome of a case. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350 n. 26 (1963); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 387 (1948).

II. THE LEGAL ISSUE OF UNION LIABILITY FOR BACK PAY UNDER THE ADEA REMAINS AN IMPORTANT QUESTION OF FEDERAL LAW WORTHY OF THIS COURT'S CONSIDERATION

ALPA's detailed discussion of what it perceives are the "facts" of this case is a vain effort to obfuscate the clear *legal* issue presented in TWA's petition: whether a union can be jointly liable with an employer for back pay liability when both have been found to have violated the ADEA. This presents an important question of federal law involving a statute of increasing significance for employers, employees and unions alike.*

Indeed, ALPA implicitly admits that the issue is worthy of this Court's consideration when it says there is a "fundamental question of an employee's rights under § 7(b) of the ADEA" (Br., p. 17). While ALPA argues that the "issue should be determined in a case in which an *employee* has a direct stake in labor organization monetary liability" (Br., pp. 17-18) (emphasis in original), that claim is simply a red herring.** TWA's basic question remains whether an employer should be stuck with total monetary liability when the "statutory prohibitions" in the ADEA are even conceded by ALPA to apply to a union (Br., p. 29). It therefore is not just "abstract statutory 'purposes' " (ALPA Br., p. 15) which TWA is discussing but rather the ADEA's clear "statutory prohibitions" applicable to both employer and union alike. The plaintiff employees here have as much of a "direct stake" in the outcome of the issues as they would in any other case challenging an action by both employer and union.

In fact, despite ALPA's suggestion to the contrary (Br., pp. 34-35), there are myriad situations wherein both the employer

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* It is also one on which both the *Thurston* plaintiffs (Br., p. 10) and the EEOC (Br., p. 18) agree that TWA is right.

** Later in its brief, ALPA repeats the same mistake when it says TWA's position "will not result in any benefit to plaintiffs in this action." (Br., p. 32).

and the union will be challenged under the ADEA. For example, in addition to the collective bargaining context noted in TWA's petition (p. 17),* a district court recently held that an EEOC interpretation allowing age restrictions on apprenticeship programs was unlawful. *Quinn* v. *New York State Electric and Gas Corp.*, 569 F. Supp. 655 (N.D.N.Y. 1983). If adopted elsewhere, all age-restrictive apprenticeship programs (so often the product of union and employer negotiations) are fair game for attack. Yet, under the decision below, only the employer faces monetary liability. The same unfair result will continue unless this Court clarifies whether Congress intended to insulate unions from such monetary liability.**

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* Any suggestion by the EEOC (Br., pp. 3-5) that requiring Captains to bid for a Flight Engineer vacancy was not the normal procedure for changing status under the contract is simply wrong. TWA's bidding requirements were upheld by an arbitrator as in full accord with the Working Agreement (ALPA Br., B-13 to B-19). The arbitrator was Harry T. Edwards, who is now a member of the United States Court of Appeals for the District of Columbia Circuit.

** It is frivolous for ALPA (Br., p. 33) and the *Thurston* plaintiffs (Br., p. 11) to suggest that TWA is somehow barred from raising the question of union liability for back pay simply because TWA did not file a cross-claim against ALPA. This is not a case of contribution since, unlike the situation in *Northwest Airlines, Inc.* v. *TWU*, 451 U.S. 77 (1981), the union is a *co-defendant* with TWA. It is also inapposite for ALPA to claim in its brief (p. 23 n.) that courts have refused to read *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), as support for an employer's right to contribution against unions. In *Sagner*, as here, the union was a *co-defendant* with the employer, and both were held liable for money damages under the Equal Pay Act, 29 U.S.C. § 206 (326 F. Supp. at 373-74).

Finally, even if a cross-claim were necessary against ALPA, Rule 15(b) of the Federal Rules of Civil Procedure permits an amended pleading "even after the judgment." Rule 15(a) further specifies that leave to amend "shall be freely given," and "this mandate is to be heeded." *Foman* v. *Davis*, 371 U.S. 178, 182 (1963). "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities." (*Id.* at 181).

III. NO ONE DISPUTES THE BROAD RAMIFICATIONS OF THE LIABILITY STANDARD ADOPTED BY THE SECOND CIRCUIT

Significantly, no one challenges TWA's assertion in its petition (p. 17) that the "ramifications of the majority's basis for liability are enormous" for all employers. TWA's warning therefore continues to bear urgency: every time employers give a benefit for a non-age reason, they now live in fear that other employees will claim they are entitled to the same benefit simply because of their age (Petition, pp. 18-19).

This Court should consider whether that is what is mandated by the ADEA—particularly in view of its legislative history and the discussion by the other two Circuits which have considered how far employers must go in accommodating employees because of their age (Petition, pp. 19-20). The holding below transcends the facts of this case, and it should be addressed by this Court before it is adopted by other Circuits.*

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* If TWA's petition is granted on the issue of liability, it can address at that time the question of whether TWA treated everyone equally, as it believes; or whether TWA "imposed extra-contractual rules on sixty year olds alone," as asserted by the *Thurston* plaintiffs (Br., p. 11 n. 18). Either way, the principle established in the decision below is so great for employers and employees alike that it should be considered by this Court in any event.

In this regard, it should be noted that unlike all the other eight airline "age 60" cases cited by the EEOC (Br., p. 8 n. 6), TWA was the *only* airline which voluntarily adopted a policy of allowing Captains to serve as Flight Engineers beyond age 60. Ironically, as Judge Van Graafeiland noted in his dissent, "[i]nstead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination." (A-36).

Respectfully submitted,

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